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NO. 853

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

BETTY JOHNSON — Appellant

vs.

THE STATE OF MISSISSIPPI — Appellee

Appeal From The Supreme Court of the State Of Mississippi

STATEMENT AS TO JURISDICTION

E. H. CUNNINGHAM, JR.
And
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Attorneys for Appellant

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

BETTY JOHNSON — Appellant

vs.

THE STATE OF MISSISSIPPI — Appellee

STATEMENT AS TO JURISDICTION, BRIEF, AND OTHER MATTERS REQUIRED BY RULES 13 AND 15

In compliance with Rules 13 and 15, Appellant files her Statement of Jurisdiction and other matters required.

STATUTORY PROVISIONS SUSTAINING JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked under Title 28, U. S. C., Sec. 1257 (3).

FEDERAL QUESTIONS SOUGHT TO BE REVIEWED

Appellant was denied her Constitutional rights and guaranties by a judgment of the Circuit Court of Harrison County, Mississippi, wherein she was convicted of the crime of "possession of burglary tools" and was sentenced to serve a period of one year in the County Jail, which conviction was affirmed by the Supreme

Court of the State of Mississippi on the Eighth day of October, 1962, said affirmance by the Supreme Court has deprived Appellant of her Constitutional rights, said conviction being based upon an unlawful arrest and illegal search of the personal property of the Appellant and the introduction into evidence of certain articles illegally and unlawfully seized by Officers of the Mississippi State Highway Patrol. Appellant was further denied her Constitutional rights and her right to a fair and impartial trial in the conduct of her trial by numerous errors committed by the Court in said trial, thereby depriving Appellant due process of law as guaranteed by the 14th Amendment to the Constitution of the United States and the rights guaranteed her by the 4th Amendment to the Constitution of the United States."

TIMELINESS OF APPEAL

The Supreme Court of Mississippi on October 8, 1962, affirmed the conviction of the Appellant and thereby the judgment became final. Her notice of appeal was filed within the ninety days as allowed by the rules of this Court, and thereafter on the 7th day of January, 1963, prior to the expiration of ninety days, a Justice of the Supreme Court of Mississippi allowed her an enlargement of 45 days within which to docket her appeal, and the record together with this instrument is due in the Supreme Court of the United States on or before the 21st day of February, 1963.

STATEMENT OF THE NATURE OF THE CASE AND RULINGS OF COURTS BRINGING THIS CASE WITHIN JURISDICTIONAL PROVISIONS ON WHICH RELIANCE IS MADE.

Appellant was in an automobile which was driven by George Fuqua at the time Fuqua was arrested by Offi-

cers of the Mississippi Highway Patrol, and thereafter, the Appellant was arrested without a warrant, without probable cause and while not committing any crime or violation of the law within the presence of said officers. The automobile of Fuqua was searched and certain tools and articles were taken therefrom which were alleged to have been burglary tools. In the search of said automobile the officers seized Appellant's purse, or handbag, which contained two pistols and a policeman's badge and this was done without the knowledge or consent of Appellant. Because of the unlawful arrest and the search of her handbag, this was an illegal search and seizure. The articles taken from her purse were introduced into evidence in the trial of this cause over the repeated objections of Appellant, as such articles were the result of an illegal search and were not described in the indictment, and further for the reason that said articles were not adapted to the commission of the crime of burglary.

Appellant was merely a passenger in said automobile and it was not proven that she had any knowledge of the alleged burglary tools being in the automobile, nor was it shown that said items were intended to be used as burglary tools. Appellant was deprived of her Constitutional rights by the remarks of the County Attorney upon her failure to testify and in the Courts refusing to grant certain instructions requested by her.

Because of the introduction of the fruits of an illegal search, and with all respect and with the greatest of deference, and with no thought of the imputation of bad faith either upon the Trial Court or the Appellate Court, we submit that the record in this case is so wholly devoid of competent evidence that a conviction under it and the law would be arbitrary in the sense that it would result in the taking of the liberty of Appellant without

due process of law, both within the purview of the 14th Amendment to the Constitution of the United States, and Article 3, Sections 23 and 26 of the Constitution of the State of Mississippi.

McKnight vs. U. S., 87 U.S. App. D.C. 151, 183 F. 2d 977.

U. S. vs Chocak, D.C., 68 F. 2d Supp. 455.

Patenotte vs. U. S., 5 Cir., 266 F. 2d 647, 27 A.L.R. 733, 39 A.L.R. 829

State of Washington vs. Kinnear, 162 Wash. 214, 289 P. 449, 74 A.L.R. 1400.

GROUNDS AND DECISIONS SUSTAINING JURISDICTION AND DEMONSTRATING SUBSTANTIAL FEDERAL QUESTIONS

That the affirmance of the sentence of the Trial Court imposed upon Appellant by the Supreme Court of Mississippi amounted to a deprivation of the Appellant to be secure in her person, home, papers and effects against unreasonable searches and seizures in that her arrest was unlawful and the search of her personal property was without a warrant, without probable cause and was not incident to a lawful arrest.

I.

The Supreme Court of Mississippi should have held such search illegal and the evidence obtained by said search inadmissable in evidence.

II.

The Appellant was denied her Constitutional rights to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States by being con-

victed of the crime of possession of burglary tools wherein the record conclusively shows that all of the competent evidence failed to show that the Appellant was guilty and failed to prove the essential elements of said crime.

III.

Because of the introduction of the incompetent and irrelevant evidence in the trial of this cause, the refusal of the Trial Court to grant certain instructions, and the prejudicial statements made by the County Attorney, Appellant has been deprived of her Constitutional rights.

The Supreme Court of Mississippi should have reversed this cause and dismissed the Appellant for the reasons hereinabove enumerated.

Article III, Bill of Rights, Sections 26 and 23, Constitution of Mississippi.

XIV Amendment to the Constitution of the United States.

Mapp vs. Ohio, 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684.

Fourth Amendment to the Constitution of the United States.

Blackburn vs. Alabama, 361 U.S. 199, 4 L. ed. 2d 242, 80 S. Ct. 274.

Rogers vs. Richmond, 365 U.S. 534, 5 L. ed. 2d 760, 81 S. Ct. 735.

U. S. ex. rel. Montgomery vs. Ragen, D.C. Ill., 86 S. Supp., 382, 388, 391.

CONCLUSION

It is respectfully submitted that this Court should take jurisdiction of this cause because important and substantial Federal Jurisdictional questions were disposed of by the State Courts contrary to the rights of Appellant as herein set out and guaranteed him by the Constitution of the United States. Upon hearing there should be exercise of the supervisory powers of this Honorable Court upon the issues thus presented and determined.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 42,144

BETTY JOHNSON

Vs.

STATE OF MISSISSIPPI

ETHRIDGE, JUSTICE:

Appellant, Betty Johnson, was convicted in the Circuit Court of Harrison County of the possession of burglar's tools, and was sentenced to one year in jail. The relevant statute, Miss. Code 1942, Rec., Sec. 2044, provides: "It is unlawful for any person to have in his possession implements, tools, or instruments designed to aid in the commission of burglary, larceny or robbery; and on the conviction of any person thereof, he shall be punished by imprisonment . . . The carrying concealed about one's baggage, implements, tools, or instruments peculiarly adapted to aid in the commission of burglary, larceny or robbery, shall be prima facie evidence of intention to use them for such purpose." The issues turn on the sufficiency of the evidence to convict, and consideration of the exclusionary rule of evidence in searches and seizures.

This is a companion case to George Fuqua v. State, No. 42,145, decided this day. The State's evidence was presented by Highway Patrolman Anderson; defendant offered none. On January 16, 1961, Anderson was patrolling Highway 90 on the beach in Harrison County and saw in a passing car George Fuqua. Previously he had been advised by police radio that there was a warrant outstanding for him on a perjury charge. The patrolman turned his car around and caught up with Fuqua's car

just as it pulled in front of a restaurant. James Dolan and defendant Betty Johnson were also on the front seat. Anderson drove up by the side of the car, when the three occupants were in the process of getting out of it. He placed Fuqua and the others under arrest. Anderson directed Johnson to drive Fuqua's car to patrol headquarters about five miles away. Fuqua came in with Anderson, and Dolan rode in another patrol car. The Fuqua car had a Georgia tag and was registered in the name of R. K. Head. The back seat was covered with clothes. Before driving to the patrol station, Anderson saw the clothes. Defendant admitted some of them were hers. Upon arriving at the police station, defendant, Fuqua and Dolan were interrogated from one to two hours. The officer did not see Johnson violate any law in his presence, and had no search warrant for the automobile.

After arrival at the patrol station, Fuqua's automobile was searched. In it were found a large amount of male and female wearing apparel; a large red blinker light; a large seal-beam light equipped with a red light on its opposite end; another large light; a small keyhole flashlight; about twenty-five extra rounds of .38 caliber ammunition; three boxes of flare red Kleenex; a box containing approximately 150 keys for various types of automobiles plus two key rings with keys for juke boxes, pay telephone coin boxes, amusement boxes, cigarette machines, etc., and a set of socket wrenches.

The officers also found a brown leather bag, which contained a police sergeant's badge, and two fully loaded .38 caliber pistols. Defendant admitted the bag belonged to her. The record reflects the ownership of this bag which was unknown to the officers, until after the search, when it was claimed by appellant.

The indictment against Betty Johnson did not allege that the badge and two pistols found in the brown leather bag were instruments designed to aid in the commission of burglary and larceny. It was directed toward the other stated instruments. The opinion in Fuqua v. State discusses the adequacy of the evidence there (and here) to show that possession of the stated implements and tools could be classified as possession of burglar's tools. 9 Am. Jur., Burglary, Sec. 89; 12 C. J. S., Burglary, Sec. 69.

There are three elements of the offense of the possession of burglar's tools: Adaptation and design of the tools or implements for breaking and entering; possession of them by one with knowledge of its character; and a general intent to use or employ them in breaking and entering. The evidence was ample on the first issue, adaptation and design for the stated purpose. Fuqua v. State, *supra*.

As to the character of possession, it may be actual or constructive. The State need not prove an actual possession, or that the tools were taken from the person of defendant. Possession may be joint or individual, and two or more may be in possession of burglar tools where they have the joint power of control and an inferable intent to control jointly. Commonwealth v. Segers, 167 Pa. Super. 642, 76 A. 2d 483 (1950); State v. McHenry, 207 Iowa 760, 223 N. W. 535 (1929); 12 C. J. S., Burglary, p. 754. Two persons may have constructive possession, or one may have actual possession and the other constructive possession. Anno., 103 A. L. R. 1314 (1936); 9 Am. Jur., Burglary, Sec. 86. Constructive possession may be shown by circumstantial evidence, and the jury may weigh the surrounding circumstances. Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698 (1951); State v.

Salernitano, 27 N. J. Super. 537, 99 A. 2d 820 (1953); Missouri v. Hefflin, 338 Mo. 236; 89 S. W. 2d 938, 103 A. L. R. 1301 (1935).

In the instant case the jury was warranted in finding that Johnson was in constructive joint possession of the burglar's tools with her companions. She was riding in the car with Fuqua and Dolan. She admitted that the female wearing apparel on the back seat was hers. And after the search was made by the officers, she admitted that the brown leather bag in the back seat, containing the policeman's badge and two loaded pistols, belonged to her. These facts and Johnson's admissions were all circumstances for the jury to consider in determining whether she was in constructive possession of the tools and implements alleged to be burglar's tools. Admitted ownership by her of the bag with the badge and two pistols is a circumstance of considerable probative value on the intent and purpose of her presence in the car, and on her intent with reference to the burglar's tools.

Newton v. State, 232 Miss. 114, 98 So. 2d 116 (1957), involved different facts. It was undisputed that Newton had been in the car as a passenger with the driver only about twenty minutes, and Burt had complete control of the automobile and its contents. There was no evidence to suggest Newton was connected with the possession of the tools. Newton testified and explained his temporary presence in the car. Hence the court held that he was entitled to a peremptory instruction.

Johnson was her privilege, did not testify, and offered no explanation. There is no evidence indicating she was in Fuqua's car temporarily. Her clothing and her bag with the badge and pistols were in the car. Hence the evidence made a jury issue on whether she was in

constructive possession of the burglar's tools, and whether she had a general intent to use them in committing a crime.

Smith v. State, 240 Miss. 738, 128 So. 2d 857 (1961), reversed Smith's conviction for possession of burglar's tools, because he was unlawfully arrested while driving his automobile. However, Head and Cummings v. State, 136 So. 2d 619 (Miss. 1962), affirmed the convictions on the same charge of Smith's two companions in the car. During the chase by police they were seen throwing the tools out of the car. It was held that, since these defendants were not in possession of the automobile, they could not raise the constitutional question of an unlawful search and seizure. Accordingly, Johnson does not attack the search of Fuqua's automobile, pursuant to a lawful arrest of Fuqua on probable cause. The search of Fuqua's automobile was properly incident to his arrest. See Fuqua v. State, *supra;* 47 Am. Jur., Searches and Seizures, Sec. 19; 79 C. J. S., Searches and Seizures, Sec. 67.

Appellant is confined to the claim that the search of her brown leather bag (containing a badge and two loaded pistols) was illegal, and evidence as to its contents was improperly admitted. The trial court held that search of the bag was an incident of Fuqua's arrest, and its contents were of probative value on the issues of Johnson's constructive possession and intent. We think this ruling was correct. Appellant concedes that search of the car was properly incident to his (Fuqua's) arrest, which was lawful. Fuqua v. State, *supra.* Johnson's arrest at that time was illegal because without probable cause or warrant. However, the searching officers did not know at the time of search that the bag belonged to her. This fact does not invalidate an otherwise lawful search of the contents of the car. The officers had author-

ity to search everything in Fuqua's car unless they were forewarned that the bag belonged to someone else. Bradley v. State, 209 Miss. 750, 48 So. 2d 365 (1950); State v. Green, 292 S. W. 2d 283 (Mo., 1956); U. S. v. Rees, 193 F. Supp. 849 (D. C. Md., 1961); see Head and Cummings v. State, *supra;* 47 Am. Jur., Searches and Seizures, Sec. 19. Moreover, appellant voluntarily admitted to the officers, after the search, that the bag belonged to her. Quan v. State, 185 Miss. 513, 188 So. 568 (1939).

The exclusion of unlawfully seized evidence is justified as necessary to deter police misconduct by illegal searches and seizures, and for the protection of rights of privacy. Anno., 4 L. Ed. 2d 1982 (1960); Tucker v. State, 128 Miss. 211, 90 So. 845 (1922). The reasons for the rule would not be served by excluding the evidence as to the contents of Johnson's bag. Those items were not charged in the indictment as burglar's tools, but were simply admitted on the issues of constructive possession and intent.

Exclusion of that evidence would not tend to prevent future unauthorized searches. The instant one was authorized. An officer lawfully searching an automobile possessed by one person does not make the search subject to later partial invalidity by a declaration after the search by another than an object in the car belonged to her. Neither the reason nor purpose of the exclusionary rule warrants that restrictive interpretation. See Comment, Judicial Control of Illegal Search and Seizure, 58 Yale L. J. 144 (1948); Allen, The Exclusionary Rule in the American Law of Search and Seizure, 52 J. of Cr. Law, Criminology and Pol. Sc. 246 (1961); Anno., 50 A. L. R. 2d 533 (1956); Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). We have considered

the other assignments of error, and find them without merit.

AFFIRMED.

McGEHEE, C. J., AND KLYE, GILLESPIE AND JONES, JJ., CONCUR.

CERTIFICATE

I, E. H. Cunningham, Jr., of Counsel for the Appellant herein, hereby certify that I have this day personally delivered a true and correct copy of the above and foregoing statement as to jurisdiction to Honorable Joe T. Patterson, Attorney General of the State of Mississippi, at his office at the State Capitol Building at Jackson, Mississippi.

Witness my signature this the 19th day of February, 1963.

E. H. Cunningham, Jr.

E. H. Cunningham, Jr.
of Counsel for Appellant

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